Supreme Court, U.S.
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No. 01-1369

In the

Supreme Court of the United States

GUY PIERCE and MARK A. PIERSON,

Petitioners,

v.

RANDY BOSS and REVELL BOSS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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28pp

TABLE OF CONTENTS
TO SUPPLEMENTAL APPENDIX

Page

Memorandum and Order of the United States District Court for the Northern District of Illinois dated September 14, 1998 ..... Supp. App. 1

[Dated September 14, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel. RANDY BOSS and REVELL BOSS,	)	
Petitioners,	)	
vs.	)	No. 97 C 2874
GEORGE DETELLA, Warden, Stateville Correctional Center,	)	
Respondent.	)	

MEMORANDUM AND ORDER

Petitioners Randy and Revell Boss, inmates at Stateville Correctional Center in Joliet, Illinois, serving sentences for robbery and first-degree murder, have brought this petition for habeas corpus, claiming that the trial in which they were convicted of these crimes had several constitutional errors. Specifically, they argue that 1) they were denied their due process right to present their theory of the case when the trial court refused to give an "accomplice instruction" to the jury; 2) they were deprived of their Sixth Amendment right to confront witnesses against them when the state informed the jury that non-testifying witnesses had accused them; 3) the trial violated the Sixth Amendment because prosecutors made an improper reference to one witness' prior consistent statement; 4) the Sixth Amendment was again violated when the trial court improperly restricted defense counsel's lattitude [sic] on cross examination; 5) their counsel was ineffective for failing to ask for a jury instruction on one witness' potential bias; 6) the state withheld exculpatory evidence in violation of the

Supreme Court's ruling in *Brady v. Maryland*; 7) they were deprived of due process when the trial court rejected their motion to have an evidentiary hearing in connection with their motion for a new trial. For the reasons stated below, petitioners' claims are denied.

BACKGROUND

Petitioners Randy and Revell Boss were convicted by a Cook County jury of the first degree murder of Eugene Oliver. The trial court sentenced Randy Boss to concurrent terms of 50 years for murder and seven years for robbery, and sentenced Revell Boss to forty years for murder and seven years for robbery. Two other defendants, Nikia Harris and Corey Carter, were charged with the same crimes but were tried separately and are not party to this petition.

The facts as determined by the state appellate court are as follows:

> Robert McAfee, who was 16 years old at the time of his testimony, was the State's key witness. He testified that on the evening of September 6, 1993, he was picnicking with his family in Garfield Park in Chicago. At approximately 10:45 p.m. that evening, Robert's family left the park and returned home in their car, while Robert headed for home on his bicycle.
>
> At the corner of Franklin and Drake, Robert stopped to talk to a girl who was leaning out of a window. After about a minute, the girl closed the window. Across the street, Robert observed four men standing outside the senior citizens' home located at 440 North Drake, drinking beer. A woman he did not know was with them. He knew that the men's first names were Keater, Corey, Randy and Vell. He did not know their last names, with the

exception of Corey's, which he knew to be Carter. Robert positively identified defendants in court as Randy and Vell. Although he did not hang around with defendants, who were older than he was, he knew them from the neighborhood.

Robert saw a man, later identified as Oliver, come out of the senior citizens' home, turn left and walk to Franklin. The men began to follow the man. Randy approached McAfee and asked him if he could use his bicycle. When McAfee said no, Randy kicked the bike and took it from him. McAfee started to chase him.

During this time, the man, who had exited the senior citizen's home and had been walking west on Franklin, entered Central Park. Randy, who was riding McAfee's bicycle, caught up with the man and threw the bicycle at his legs, causing him to fall. Robert observed this from where he had stopped across the street on Franklin. Although McAfee did not remember where they came from, Corey, Keater and Vell were also present. The four men began beating Oliver. Oliver managed to pull out a knife, but Carter knocked it away. The group of four men repeatedly kicked Oliver in the face and on his side. Randy picked up the bicycle and threw it on Oliver's head three times. McAfee identified the bicycle in court and demonstrated the manner in which Randy threw the bicycle at Oliver.

Randy, Keater and Corey had their hoods pulled onto their heads, but Revell did not. Nevertheless, McAfee had no trouble seeing their faces. The street lights were all working. The beating, which McAfee stood watching, lasted about a minute. Afterwards, Oliver was not moving. McAfee saw Randy reach into Oliver's pocket.

The four defendants walked past McAfee, at which time McAfee saw that Randy had a $20 bill in his hand. McAfee heard one of them say that they were going to the store for beer. Randy told McAfee, "Don't say nothing, don't tell nobody." McAfee then retrieved his bicycle which was in the park near Oliver, who was making sounds that McAfee could not distinguish. The crank was bent so McAfee pushed his bicycle home. Because of Randy's threat, he did not mention the incident to anyone. He eventually told the police what happened when they brought him in for questioning.

At this point in McAfee's testimony, the prosecution raised the issue of his prior adjudication for manslaughter. When McAfee was 13 years old, his friend, Tyrone Johnson, was killed while he and Johnson were playing with a gun in Johnson's basement. The adjudication raised the issue of McAfee's credibility because when first questioned by police, McAfee said that Johnson had shot himself. Later that day he told the truth, stating that he originally lied about the incident because he was scared. At the time of trial in this case, McAfee was still on probation for manslaughter.

On cross-examination, defense counsel elicited testimony from McAfee that his nickname was "Coochie," and the he originally lied to police about Johnson's death because he was scared. McAfee admitted that he was also scared when questioned by the police concerning this case. He was not photographed or fingerprinted, but was placed in a line-up. He went home the same day, after being interviewed. McAfee testified inconsistently regarding the fact that he told an assistant State's Attorney and the grand jury that Corey, Keater and Revell ran toward the victim, but at trial stated

that they walked toward the victim. He also did not remember how many times the men kicked the victim or which foot each of them used.

Detective Gene Harris of the Chicago Police Department, who was assigned to the case on September 23, 1993, testified for the State as to the various steps he took during his investigation of the murder. Based on conversations with Beulah Williams and Melvilet Moore, who provided descriptions, names and the address, 445 North Drake, of the possible offenders, Harris found Keater, who admitted that his real name was Nikia Harris, standing in front of that address. Harris placed Keater under arrest and took him to the police station. After interviewing Keater, Harris placed Carter under arrest. After interviewing Carter, Harris arrested defendants.

Harris testified that he took McAfee, a witness to the incident, to the police station to be interviewed. He did not believe McAfee was a suspect, but nevertheless called a youth officer and gave McAfee his *Miranda* rights upon questioning. Harris did not arrest McAfee. Harris acknowledged that he wrote in his report that McAfee "hooked up" with defendants and also admitted that McAfee was mistakenly listed as an arrestee on defendants' arrest reports, which were prepared by another officer but signed by Harris. He also testified that the arrest reports he prepared and typed for Carter and Harris listed McAfee as an arrestee, but he never prepared an arrest report for McAfee. Although he did not remember placing McAfee in a line-up, Harris stated it was police practice to use individuals at the station as fillers for line-ups. After he interviewed McAfee., he took him home.

Beulah Williams, Oliver's girlfriend, testified for the State that on Labor Day, 1993, shortly before 11:00 p.m., Oliver went to the store. He never returned.

Assistant Cook County Medical Examiner Larry Simms testified that Oliver sustained many external injuries, along with internal cranial injuries. He further testified that the cause of death in this case was cerebral injuries due to blunt trauma. Oliver died approximately three weeks after he was beaten.

The defense called four witnesses. Antonio Shanklin stated that he witnessed the beating of Oliver. He saw about four or five boys beating up one man. He saw one of them pick up a bicycle and hit the man with it, but could not see who that person was because he was too far away. However, the person who hit Oliver with the bicycle, got on the small, red bicycle, after fixing the chain, and rode past him. That person was McAfee, whose face he saw for the first time on the corner of Franklin and Central, after the victim had been beaten. Shanklin testified that there was no interruption in his vision and that he never saw McAfee on the red bicycle again. The rest of the boys ran past Shanklin. They were about 30 or 40 feet away from him. He had never seen them before.

When asked whether defendants, who he had known for about three years from the neighborhood, were in the group that ran past him, Shanklin replied, "No, they weren't." While the fight was in progress on the west side of the park, he saw Revell on the east side of the park. He never saw Revell cross over to where the fight was. Shanklin had never seen the bicycle which was shown to him

as the State's exhibit during the trial. He never contacted the police or the state's Attorney's office about his knowledge of the crime. Defendants' family asked him to testify.

Contina Hill, Randy's girlfriend and the mother of his child, testified for the defense that on September 6, 1993, Randy was home with her all day, leaving only twice. The first time he left he went to Gregory Carter's apartment downstairs. Gregory Carter is Corey Carter's cousin. The second time he left was at night with Gregory and two other men. When Randy and Gregory returned a short time later, they had beer. Contina never contacted law enforcement officials regarding her belief that Randy could not have committed the crime.

Janice Hill, Contina's sister, testified for the defense, corroborating her sister's testimony and adding that when Randy left the apartment the second time, he was gone approximately 15 minutes. She also did not notify law enforcement officials regarding her belief that Randy could not have committed the crime.

The fourth and final defense witness was Tonya Gist, who testified that on the night of the murder she witnessed McAfee fighting an older man from the senior citizens' home. A large crowd was standing around. She proceeded home, where she shared a back porch with Contina Hill, and saw Randy sitting there. He was still there when she locked the gate later that evening. Revell came over sometime after Tonya got home[.] She too never told any law enforcement officials about what she had witnessed.

Following the instruction conference, the defense moved for a continuance due to an investigative

> report they received from the State allegedly that day, the last day of trial, which was based on the State's interview of defense witness Janice Hill on June 24, 1994. The report was prepared in response to Randy's answer to discovery filed on June 23, 1994, five days before trial. In that report, which was prepared by Investigator Joseph D. Fallon, Hill stated that Coochie (McAfee) was bragging around the neighborhood about "what he and his friends did to that man." She also stated that a man named Richard Mitchell was allegedly told by McAfee that the only reason McAfee said that defendants committed the murder was so that McAfee would not get into trouble[.] The defense request him to locate Mitchell, whereupon the State responded that Hill was a defense witness and the defense certainly had had the opportunity to interview her. Counsel for Revell stated that Hill was Randy's alibi witness and that counsel for Revell had not discussed her testimony with her. The trial court denied the motion. The defense did not object as to the timing of the State's disclosure of the investigative report. Based on the information obtained, new defense counsel conducted an investigation that produced the written statements of Marcus Fowler and Ricky Boss and the statement by telephone of Richard Mitchell that McAfee had told them that he, not defendants, committed the offense.

People of Illinois v. Boss, No. 93 CR 23556 (Order of the Illinois Appellate Court), p. 2-9. Petitioners filed, and the trial court denied, a motion for a new trial, which apparently incorporated the information from the Janice Hill statement. Petitioners also filed a direct appeal in Illinois which stated exactly the same claims that they present in this petition for habeas corpus. In fact, petitioners' counsel did not compose briefs in support of this claim for habeas

relief, but instead simply refers this court to the documents filed on appeal. In any event, the Illinois court denied that appeal on all claims.

ANALYSIS

I. *Standard of Review*

Because each of petitioners' arguments were raised on his direct appeal to the Illinois Appellate Court, which affirmed the trial court's ruling after considering the merits of their claims, his habeas corpus claim must meet the requirements of 28 U.S.C. §2254(d)(1) or (2) before this court can reconsider these claims. The relevant section provides:[1]

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The Seventh Circuit has addressed the meaning of this relatively new statute at considerable length in *Lindh v.*

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[1] On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which modified the habeas corpus statute, 28 U.S.C. §2254, by moving the old subsection (d) and the one listed here.

Murphy, 96 F.3d 856 (7th Cir. 1996), where it denied a prisoners' habeas corpus petition on the grounds provided in section (d). The petitioner in that case appealed to the Supreme Court, which has granted *certiorari* only with respect to the issue of when the statute became effective and whether it applies retroactively. *Lindh v. Murphy*, No. 96-6298, 117 S.Ct 726 (Jan. 10, 1997); *see also* Petitioner's Brief to Supreme Court, 1997 WL 82672, Count I.

The *Lindh* court noted that the first part of section (d)(1) (the "contrary to" phrase) focuses only on the state court's resolution of questions of law and permits the lower federal courts to grant habeas petitions when the state court's ruling violates a ruling of the Supreme Court, but not when it conflicts only with the ruling of a lower federal court. *Lindh*, 96 F.3d at 869. Thus, the habeas petitioner must be able to point to such a ruling or his claim will not prevail under that subsection. The second part of section (d)(1) (the "unreasonable application" phrase) focuses on "mixed questions of law and fact" and permits a federal court to grant a habeas petition if the state court's application of the law to the facts is based on "an error grave enough to be called 'unreasonable.'" *Lindh*, 96 F.3d 870. Obviously, "unreasonable" is difficult to precisely define and will inevitably depend on all of the circumstances attendant to the state court's decision, but the Seventh Circuit has noted that "a responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgement." *Id.* at 871.

Section (d)(2), by contrast, allows the federal court to grant a habeas petition where the facts relied on at trial were simply not a reasonable interpretation of the events in light of evidence presented. 28 U.S.C. §2254(d)(2). Note, however, that under section (e)(1) the trial court's determination of factual issues is presumed to be correct and petitioner can rebut this presumption only upon a showing

of clear and convicting evidence to the contrary. 28 U.S.C. §2254(e)(1). In this case, the petitioners do not point to any new evidence or clear error of fact by the trial court. As mentioned above, the brief they submitted in support of their habeas petition simply incorporates by reference the brief submitted in support of their direct appeal in state court and no additional argument is made. In that appeal, petitioners did not argue directly that the jury incorrectly interpreted the facts, and upon reviewing the evidence none of the factual determinations appears unreasonable if McAfee's testimony is credited. Rather, petitioner contends that the jury credited that testimony because of errors. Accordingly, we deny the petition for habeas corpus insofar as it was premised on section §2254(d)(2) and the remainder of this opinion will consider whether petitioners' claims are cognizable under (d)(1).

II. *Accomplice Instruction*

Petitioners first argue that they were denied their due process right to present their theory of the case when the trial court refused to give the jury an "accomplice instruction," which would have instructed the jury to be suspect of McAfee's testimony because he may have been an accomplice. It has been established, however, that a court's failure to give an accomplice instruction does not rise to the level of a constitutional violation, particularly where other evidence corroborated the alleged accomplice's verison of events. *See, e.g., Kappos v. Hanks*, 54 F.3d 365 (7th Cir. 1995) (holding that "[a]lthough cautionary accomplice instructions are preferred in the federal courts . . . the failure of a state court to give such an instruction does not rise to the level of a constitutional violation), *citing United States ex rel. Swimley v. Nesbitt*, 608 F.2d 1130, 1133 (7th Cir. 1979); *Jackson v. Hutto*, 508 F.2d 890 (8th Cir. 1975) (holding that the trial court's failure to give an accomplice in-

struction would not raise an issue of constitutional magnitude and consequently a claim based on such omission was not cognizable in habeas corpus) (citations omitted). Habeas relief is available only for violations of federal law as determined by the Supreme Court, whereas questions regarding the necessity of jury instructions primarily involve questions of state law. *See United States ex rel. Peery v. Sielaff*, 615 F.2d 402, 403 (7th Cir. 1979) (holding that an omitted jury instruction is much less likely to raise a constitutional issue on habeas than is an erroneous one); *Grant v. Rivers*, 920 F.Supp. 769 (E.D.Mich. 1996) (holding that trial court's failure to provide an "accomplice instruction" was not reviewable on petition for habeas corpus because omission did not constitute a violation of federal or constitutional law). Accordingly, we find that petitioners' claim that they were entitled to the accomplice instruction is inappropriate for habeas review.

III. *Right to Confrontation*

Petitioners next argue that their Sixth Amendment right to confront their accusers, applied to the states through the Fourteenth Amendment, was violated when a state witness, Officer Harris, testified that his interviews with two witnesses to the murder led him to a string of additional interviews and evidence which eventually resulted in the arrest of Randy and Revell Boss. *See* Appellant's Brief (App. Brief), p. 22; App. Op. at 15-16. Petitioners claim that although Illinois rules of evidence permit police officers to testify about events that led to the instigation of an investigation or arrest, the application of that rule in this case conflicted with the constitutional requirements of the Confrontation Clause, and the state rule must consequently give way. On appeal, the Illinois court addressed this argument and concluded that because "Officer Harris did not testify as to the contents of his conversations with [the

witnesses]" and because "when he attempted to do so, defendant's objections were sustained by the trial court," Harris' testimony about the investigation was properly admitted and did not violate the Sixth Amendment. We agree.

Determining whether the admission of hearsay violated a defendant's right to confront the witnesses against him requires a two-part inquiry. We must first determine whether the testimony at issue did, in fact, constitute hearsay under the relevant state law. *Miles v. Burris*, 54 F.3d 284, 288-89 (7th Cir. 1995). If this inquiry is answered in the positive, we must then determine whether the offending testimony had a "substantial and injurious effect or influence on the jury's verdict." *Id.* In Illinois, a police officer may testify about what steps he took during his investigation that led him to target a particular suspect, "even if a jury would conclude that the police began looking for a defendant as a result of what non-testifying witnesses told them, as long as the testimony does not gratuitously reveal the substance of their statements and so inform the jury that they told the police that the defendant was responsible for the crime." *People v. Henderson*, 568 N.E.2d 1234, 1256 (Ill. 1990) *cert. denied Henderson v. Illinois*, 502 U.S. 882 (1991); *People v. Johnson*, 506 N.E.2d 563, 568 (Ill. 1987). Similarly, federal courts have held that "[a]n out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." *Miles v. Burris*, 54 F.3d 284, 288, n.1 (7th Cir. 1995) *quoting United States v. Lazcano*, 881 F.2d 402, 407 (7th Cir. 1989). Thus, where an officer limits his testimony to the fact that he received information from witnesses that caused him to investigate a certain person, but does not reveal the content of the conversation, the defendant's confrontation rights are not usually an issue. *Id.* In this case, the petitioners acknowledge that Officer Harris did not reveal the content of what the witnesses relayed to him, but

argue that the only logical conclusion that jurors could have drawn from his testimony is that the witnesses said something that implicated Randy and Revell Boss and claim that this result violates the Supreme Court's decision in *Pointer v. Texas*, 380 U.S. 400 (1964). We disagree. First, in *Pointer v. Texas* the Supreme Court held that the right to counsel in state criminal proceedings recently incorporated into the Fourteenth Amendment's due process clause in *Gideon v. Wainwright*, 372 U.S. 335 (1962), includes the right to effectly cross-examine the witness. 380 U.S. at 403 (1964). That does little to support petitioner's [sic] claim here. Second, because Officer Harris testified only about what led him to initiate the investigation and did not reveal what witnesses actually said to him, his testimony is not considered hearsay under Illinois law. Since his statements do not constitute hearsay, his testimony cannot implicate the Confrontation Clause on that ground. In the absence of any other argument we find that Officer Harris testimony did not offend federal or constitutional law and was properly admitted.

IV. *Evidence of Defendant's Prior Consistent Statement*

Petitioners next argue that they were again denied their Sixth Amendment rights and due process when the prosecutor at their trial, during both McAfee's direct examination and closing statements, referred to the fact that McAfee had given a prior consistent statement to the police. Although petitioners' counsel at trial objected to the comment made during the course of the trial, he did not object to the same conduct during closing arguments. We address the two separate instances of prosecutorial misconduct separately and find that in this case neither instance warrants habeas relief.

With respect to the prosecutor's comments during closing argument, in *Wainwright v. Sykes* the Supreme Court ruled

that a federal habeas petitioner who failed to comply with a state's contemporaneous objection rule at trial must show cause for the procedural default and prejudice attributable thereto in order to obtain review of his defaulted constitutional claim (commonly called the "cause and prejudice" standard). 433 U.S. 72, 87 (1977); *Williams v. Chrans*, 894 F.2d 928, 935 (7th Cir. 1990) (holding that "when a state court relies explicitly on a state procedural default rule in declining to review a federal question, a federal court sitting in habeas corpus jurisdiction must accept that determination as an "adequate and independent state ground" for decision of the issue["] and *citing Harris v. Reed*, 489 U.S. 255 (1988)). If petitioner cannot show cause for or prejudice from the default, the federal court hearing the habeas petition will entertain the defaulted issue only if petitioner demonstrates that the court's failure to consider the federal claim would result in a fundamental miscarriage of justice. *Williams v. Chrans*, 894 F.2d 928, 935 (7th Cir. 1990) *citing Murray v. Carrier*, 477 U.S. 478, 485 (1986).

In this case, petitioners argue that the prosecutor's reference to McAfee's prior consistent statement during closing arguments irreparably prejudiced the jury against them because it greatly enhanced McAfee's credibility, who was the key witness against both defendants. Although we agree that the prosecutor's comments were improper, such misconduct alone is not sufficient to merit habeas relief. "The relevant question is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1985) (internal quotations omitted). Under this standard we agree with the Illinois Appellate Court's determination that the prejudicial effect of the improper elements of the closing argument were minimal. First, errors of state law such as the improper admission of evidence are generally not sufficient to support

a writ of habeas corpus unless it appears that the trial as a whole "posed an unacceptably great risk of convicting an innocent person, and the judicial process therefore denied the accused due process of law." *Gonzalez v. DeTella*, 127 F.3d 619, 621 (7th Cir. 1997). Here, the statement's potential prejudicial effect was mitigated by the fact that the person who testified to McAfee's prior consistent statement in an attempt to bolster his credibility was McAfee himself. As the Illinois court observed, "the jury would not have been inclined to attribute significantly more credibility to McAfee because he provided his own corroboration." App. Op. at 18 *citing People v. Henderson*, 568 N.E.2d 1234 (Ill. 1990). Furthermore, we note that the prosecutor's statement was but one piece of a substantial amount of evidence admitted at the Boss brothers' trial. These various factors lead us to conclude that there was neither cause for their failure to object to the prosecutor's improper reference to McAfee's prior statement, nor prejudice from the same.

Petitioners also object to the prosecutor's questioning McAfee about his prior consistent statements implicating the Boss brothers in the murder during McAfee's direct examination. In contrast to the closing argument scenario described above, petitioners' attorney objected to the question at the time and the trial judge sustained that objection. *See* App. Op. at 17. Nonetheless, petitioners maintain that the mere mention of the prior consistent statement tainted the conviction. We disagree. As one court in this jurisdiction has observed.

> In a *habeas corpus* petition we will not review the evidentiary analyses of the state courts unless a specific constitutional right has been violated or error has made the trial fundamentally unfair. *See United States ex rel. Clark v. Fike*, 538 F.2d at 757. Courts have consistently held that the admission of a prior consistent statement when the declarant is

> available for cross examination at trial, as [the witness] was here, is not a question that rises to a constitutional level. *See California v. Green*, 399 U.S. 149, 157 (1970) ("the Confrontation Clause is not violated by admitting a declarant's out-of-court statement, as long as the declarant is testifying as a witness and subject to full and effective cross-examination"); *U.S. v. Dunn*, 851 F.2d 1099, 1101 (8th Cir. 1988) ("The availability of the declarant at trial vitiates the main concern of the hearsay rule, which is the lack of opportunity for cross-examination"); *U.S. ex rel. Bryant v. Vincent*, 373 F.Supp. 1180, 1184 (S.D.N.Y. 1974) (question of hearsay not cognizable in a federal *habeas corpus* proceeding where declarant was cross-examined at trial).

U.S. ex rel. Gonzales v. DeTella, 918 F.Supp. 1214, 1222 (N.D.Ill. 1996); *see also Henderson v. Norris*, 118 F.3d 1283, 1286 (8th Cir. 1997) (holding that because Arkansas law did not consider the admission of a prior consistent statement during redirect fundamentally unfair to the defendant, such statement did not warrant habeas relief). Petitioners' counsel makes no attempt to address or distinguish this case from the clear precedent on this issue, and our independent review of this claim has failed to reveal any evidence that would lead us to conclude that the prosecutor's inappropriate reference to McAfee's prior statement was so egregious as to render the entire trial fundamentally unfair.

V. *Restrictions on Cross-Examination*

Petitioners next claim that the trial court violated the Confrontation Clause by improperly restricting the defense's cross-examination of McAfee regarding 1) his state of mind when he was questioned by the police about the murder and 2) lies that he allegedly told the police in connection with a homicide adjudication in which he was in-

volved as a juvenile. Petitioners also contend that the court should have prevented the prosecution from arguing that the homicide committed by McAfee as a juvenile was actually an "accident."

"The Sixth Amendment's Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Quinn v. Neal*, 998 F.2d 526, 528 (7th Cir. 1993). The Fourteenth Amendment applies these rights to trials conducted in the state courts. *Id.* at 528-29. At trial, the defense has the right to conduct reasonable cross-examination of the witnesses testifying against the defendant concerning matters which may demonstrate that the witness is biased or motivated to testify falsely. *Id.* at 529. At its discretion, however, the court may limit defense counsel's inquiry into these matters if it determines that the questions have the effect of harassing the witness, prejudicing the jury, confusing the issues, threatening the witness' safety, or determines such questioning is repetitive or only marginally relevant. *Id. citing Olden v. Kentucky*, 488 U.S. 227, 232 (1988) (*per curiam*).

A trial court's erroneous limitation on defense cross examination might in certain circumstances constitute a Sixth Amendment violation entitling a prisoner to habeas relief. As in the case with several of petitioners' previous claims, however, such limitations are determinations about the admission of evidence, typically a state concern. *See U.S. ex rel. Bryant v. Washington*, 869 F.Supp. 601, 603 (N.D.Ill. 1994). Here, Illinois allows the trial court a substantial amount of discretion in determining the proper scope of cross examination. *People v. Dortch*, 441 N.E.2d 100, 105 (Ill. App. 1982). To challenge the court's limit on cross examination, petitioner must show that the allegedly wrongful restriction rendered the entire trial fundamentally unfair. *Sellers v. Ward*, 135 F.3d 1333, 1343 (10th Cir. 1998).

In this case, petitioners' first claim that they were wrongfully prevented from asking McAfee if he was concerned that he might be a suspect in the murder when the police initially questioned him about the incident. As the appellate court observed, however, the trial record shows that the defense was ultimately permitted to question McAfee about what his mental state was when the police approached him and thus this claim does not implicate the Sixth Amendment. *See* App. Op. at 19-20. Petitioners next argue that the trial court erred when it prevented the defense from questioning McAfee about a lie he supposedly told in the past when he was being investigated for a juvenile homicide.[2] The trial court determined the previous out-of-court lie was hearsay.

Once again, this is an evidentiary matter that ordinarily would not implicate constitutional concerns. Illinois law clearly permits a trial court to limit cross examination in this matter. *See* App. Op. at 21-22. Moreover, applying the Sixth Amendment standard described above, we find that the testimony would have been repetitive, unreliable and of questionable relevance under the Sixth Amendment analysis described above. McAfee had already been subject to the defense's cross examination on matters key to impeach-

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[2] As a juvenile, McAfee was investigated and ultimately found responsible for the accidental shooting death of a friend while the two were playing with guns at McAfee's house. During that homicide investigation, McAfee initially denied being involved in the incident. At trial, the defense wanted to question McAfee about a conversation he supposedly had with a person named Ira Fox after he had shot his friend. According to the defense, McAfee had told Fox that he had denied shooting his friend and the defense wanted to use this information to impeach McAfee's credibility. The trial judge rejected the testimony because Fox was not present and the judge had already given wide latitude in impeaching McAfee.

ment, including several witnesses claiming that they saw McAfee participate in the murder for which the Boss brothers were convicted and the fact that he was involved as a juvenile in another homicide—all powerful impeachment evidence. In short, the trial court gave the defense ample opportunity to impeach McAfee, and the trial court properly applied Illinois law in excluding the hearsay. Thus, there is no reason to conclude that the trial court's restriction on cross examination had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Finally, petitioners claim that the prosecution should have been prevented from referring to the homicide that McAfee was involved in as a juvenile as an "accident." As with the prosecutor's comments in closing argument discussed above, however, the defense failed to object to this matter at trial and is consequently barred from raising the issue now.[3]

VI. *Ineffective Assistance of Counsel*

Petitioners next argue that they are entitled to relief from their conviction because their trial counsel was ineffective by failing to request an instruction ordering the jury to disregard hearsay testimony at trial. Petitioners, however, fail to state to what hearsay testimony they are referring and have thus failed to "set forth in summary form the fact supporting each of [their] grounds" for habeas corpus and have consequently failed to state a cognizable claim. 28

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[3] Having determined that petitioners' claims of prosecutorial misconduct addressed in this section and the preceding one are meritless, we need not address petitioners' fifth argument in which he [sic] claims that the cumulative impact of these alleged improprieties deprived him [sic] of due process of law. *See* App. Brief, at 32.

U.S.C. §2254, Rule 2(c). *See also Strickland v. Washington* 466 U.S. 688, 690 (1984) (holding that "the defendant must identify the specific acts or omissions of counsel that formed the basis for his claim of ineffective assistance").

Petitioners also contend that their defense counsel should have sought a jury instruction explaining that the key prosecution witness McAfee was self-interested and biased, rendering his testimony somewhat suspect. Specifically, petitioners assert the court should have used Seventh Circuit Jury Instruction 3.20, titled "Testimony of Informers," which they argue goes beyond the "accomplice instruction" which they did request and the court denied. Jury Instruction 3.20 provides:

> You have heard testimony that [McAfee] provided information and may have received benefits from the state in connection with this case. You may give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

In *United States v. Delgado*, the Seventh Circuit set forth the requirements for establishing a claim of ineffective assistance of counsel as follows:

> The defendant bears a heavy burden in establishing an ineffective assistance of counsel claim. He must show (1) that the attorney's representation fell below an objective standard of reasonableness (performance prong), *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and (2) that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different (prejudice prong), *id.* at 694, 104 S.Ct. at 2068. *See also*, *United States ex rel. Barnard v. Lane*, 819 F.2d 798, 802 (7th Cir. 1987); *United States v. Hillsberg*, 812 F.2d 328, 336 (7th Cir.), *cert*

> *denied*, [481 U.S. 1041], 107 S.Ct. 1981, 95 L.Ed.2d 821 (1987). . . . The court's scrutiny of counsel's performance must be conducted with a high degree of deference and without the distorting effects of hindsight. *Id.* at 689, 104 S.Ct. at 2065; *United States v. Sherwood*, 770 F.2d 650, 655 (7th Cir. 1985).

936 F.2d 303 (7th Cir. 1991), *quoting United States v. Moya-Gomez*, 860 F.2d 706, 763-64 (7th Cir. 1988) *cert. denied*, 492 U.S. 908 (1989). Under this standard we find that petitioners' trial counsel performed his duties adequately. Although defense counsel was given ample opportunity to conduct McAfee's cross examination, petitioners are unable to point to any evidence that McAfee "may have received benefits" for his testimony, as the Seventh Circuit instruction provides. Although he was brought into the police station and questioned about the murder during the initial phases of the investigation, McAfee was never given immunity and, according to both the police involved and McAfee himself, was not considered a suspect. It does not appear that McAfee received any advantage by testifying and it consequently cannot be said that trial counsel was objectively unreasonable in failing to request that the jury be instructed to the contrary.

VII. *Withholding of Exculpatory Evidence*

In petitioners' seventh claim, they allege that the prosecution failed to disclose evidence that tended to exculpate them from involvement in the crime. Petitioners claim that on the last day of trial the prosecution gave defense counsel an investigative report which detailed the investigator's interview with a woman named Janice Hill, who is the sister of Randy Boss' girlfriend Contina Hill. *See* Answer to Petition for Habeas Corpus, Exhibit 1, Appendix B. In the interview, Hill stated that she had been home with Randy

Boss and four other people for most of the day from 11:30 a.m. on September 6 to 2:30 a.m. September 7. During that time, she said that Randy had gone out between approximately 3:30 p.m. and 4:00 p.m., as well as between 11:30 p.m. and 12:00 p.m. Because the attack occurred around 10:45 p.m., this testimony, if the times stated are accurate, would corroborate Randy Boss' alibi. In addition, Hill stated that McAfee was a troublemaker, that he had bragged in the neighborhood about participating in the crime, and that he had told a Richard Mitchell that he had only turned Randy in so that McAfee did not get into trouble.

Under *Brady v. Maryland*, the prosecution must disclose any evidence that is both favorable to the accused and "material either to guilt or to punishment." 373 U.S. 83, 87 (1963). This obligation is a requirement of due process. *United States v. Bagley*, 473 U.S. 667, 675 (1984). An item of evidence is deemed material if "the suppressed evidence might have affected the outcome of the trial." *Id.* at 674-75, *quoting United States v. Agurs*, 427 U.S. 97, 104 (1976).

We think, though, that the chronology of events is of some significance here. This is not a case in which the prosecution concealed evidence it had reason to believe was unknown to the defense. The defense, on June 23, 1994, just before the trial commenced, listed Janice Hill as a defense witness. Apparently that was the first time the prosecution was aware of her. The following day an investigator for the state interviewed her and prepared his report. During the trial two defense witnesses testified that they saw McAfee participate in the beating. On June 18, 1994, McAfee testified. The next day the prosecution furnished a copy of the report to the defense and Janice Hill testified thereafter. The defense could have used the report as a basis for questioning McAfee, although there is no reason to believe that he would have admitted he made the statements attributed to him. They were not admissible through Janice Hill. The

defense wanted time to locate Richard Mitchell, and that motion was denied. After the trial was over new defense counsel obtained an affidavit from a Marcus Fowler to the effect that McAfee admitted his participation and information that indicated Richard Mitchell would or might also so testify. The real concern, therefore, is that the failure to turn over the report earlier prevented the defendants from locating and producing Mitchell as a witness before the trial ended.

The appellate court gave as one reason for its decision the fact that McAfee's participation did not negate defendants' participation. Conceptually that is true, but we think that a jury that was convinced McAfee was lying about his own involvement would view his testimony about the involvement of the defendants with some skepticism. We note, however, that the jury rejected testimony of two supposed eyewitnesses, and it is improbable that Mitchell's [(]and Fowler's testimony) would have carried the day. We do not rest on that, however. Even under *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Bagley*, 473 U.S. 667 (1985), a defendant cannot complain of a failure to disclose when the information was readily available to him[.] *United States v. Morris*, 80 F.3d 1151, 1170 (7th Cir.) *cert. denied*, 519 U.S. 868 (1996). Here the government did disclose, during trial, information it had every reason to believe defendants already possessed, as the information was from a recently disclosed, previously unknown to the government, defense witness. Possibly the defense could have located the additional witnesses if the information had been available earlier, and possibly they could have compelled their attendance and possibly they would have testified as defendant [sic] so asserts [sic]. In the circumstances, however, we cannot conclude that the delay in disclosure, or even a failure to disclose, was a constitutional violation.

VIII. *Motion for a New Trial*

In petitioners' eighth and final argument, they claim that the trial court violated their right to due process by denying their motion for a new trial without granting a hearing on the matter. The ground for the motion was the discovery of new evidence, namely the statements of Marcus Fowler (Fowler) and Richard Mitchell (Mitchell), which were obtained as a result of defense's post-trial investigation of the Janice Hill statement discussed above.

Federal habeas corpus relief, however, "is available only to persons being held in state custody in violation of the Constitution or federal law." *Hodges v. Haws*, 955 F.Supp. 958, 965 (N.D.Ill. 1997) (holding that post-conviction relief and the standard under which a post-conviction petition may be summarily dismissed, without an evidentiary hearing, are creatures of state law and consequently are unreviewable by state courts). The right to file a motion for a new trial is a creation of state law. *See* 735 ILCS 5/2-1202. Under Illinois law, a trial court's determination of whether to grant a post-trial hearing to consider new evidence depends on whether the plaintiff can show due diligence in discovering the evidence and demonstrate that the evidence is so conclusive that it would probably change the outcome of the trial. *See Bishop v. Morich*, 621 N.E.2d 43 (1st Dist. 1993), *appeal denied*, 624 N.E.2d 804 (1993). Petitioners in this case have not pointed to any facts indicating that this standard or the trial court's decision summarily denying petitioners' motion for a new trial pursuant to this standard violated federal or constitutional law. Petitioners rely on *Castillo v. U.S.*, 34 F.3d 443 (7th Cir. 1994), to argue that judges should not make determinations regarding witness credibility on the basis of affidavits, a proposition that is generally true. In *Castillo*, however, the trial judge had granted the parties' motion for an evidentiary ruling but then instead of using live witnesses made a decision on the

basis of facts and evidence derived solely from affidavits. In this case, by contrast, the trial judge exercised his considerable discretion under state law and determined that a hearing was not necessary prior to ruling on the motion for a new trial. There is no evidence that the judge's decision on this matter violated federal law or offended due process and corrupted petitioners' trial.

CONCLUSION

For the reasons stated, Randy and Revell's petition for habeas corpus is denied.

/s/ James B. Moran
JAMES B. MORAN
Senior Judge, U.S. District Court

September 14, 1998